83 - 1344

No. _____

SUPREME COURT
OF THE
UNITED STATES

Office - Supreme Court, U.S.
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OCTOBER TERM, 1983

INGRAM MFG. CO. PETITIONER

V.

INTERNATIONAL UNION OF
ELECTRICAL, RADIO AND
MACHINE WORKERS,
AFL-CIO-CLC
and its LOCAL 1013, RESPONDENTS

ON WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a strike settlement agreement arbitrable as a matter of law?

2. Where a collective bargaining agreement limits arbitrable grievances and limits the arbitrator to the interpretation and application of the expressed terms of the written collective bargaining agreement, may the arbitrator base his decision upon a disputed tacit agreement beyond the four corners of the contract?

LIST OF PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to this proceeding: Ingram Mfg. Co.; International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC; Local 1013 of the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 715 F.2d. 886, 114 LRRM 3083 (5th Cir, 1983). (Reproduced and attached hereto as Appendix A.) The order and judgment of the United States District Court for the Western District of Texas are not reported. (Reproduced and attached hereto as Appendix B.) The opinion of the arbitrator is reported at 75 LA 113 (1980). (Reproduced and attached hereto as Appendix D.)

JURISDICTION

This is an action to enforce a labor arbitration award pursuant to Section 301 of the National Labor Relations Act, 29 U.S.C. § 185. The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on September 26, 1983. Petitioner-Ingram

timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc which were denied by the Court of Appeals by Order dated November 7, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This petition is timely pursuant to 28 U.S.C. § 2101(c) and U.S. Supreme Court Rule 20.4.

STATUTORY PROVISION INVOLVED

The statutory provision involved is Section 301(a) of the National Labor Relations Act, 29 U.S.C. § 185(a):

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

This is an action brought by an international union and one of its locals

to enforce a labor arbitration award. The Petitioner-Company and Respondent-Union have been parties to several successive collective bargaining agreements. On March 26, 1979, 155 of the Company's approximately 200 employees went out on strike in support of the Union's contract demands. The strike ended on or about August 24, 1979, when a new collective bargaining agreement was reached. The new contract was made retroactive to February 1, 1979. (Appendix D, pages D-1 through D-28.)

Following termination of the strike, the majority of the striking employees were returned to work within a short period of time. However, approximately 30 strikers were not recalled immediately. The Union filed a grievance under the collective bargaining agreement claiming that the Company's failure to return the 30 strikers to work immediately was in

violation of the seniority and layoff and recall provisions of the collective bargaining agreement. The grievance was submitted to arbitration pursuant to the parties' collective bargaining agreement. Before the arbitrator, the Company argued that the collective bargaining agreement did not address the recall rights of striking employees. (Appendix D, pages D-1 through D-28.)

On June 16, 1980, the arbitrator issued his award sustaining the grievance and ordering the Company to reinstate the strikers in question with back pay to August 31, 1979. Significantly, the arbitrator in his decision found that "the Collective Bargaining Agreement contains **no provision** governing the recall rights of striking employees." Having found that the collective bargaining agreement contained no provision governing the recall rights of striking employees,

nevertheless, he sustained the Union's grievance. In doing so, he posited his decision upon "the existence of a **tacit** agreement by the Company that all striking employees would be recalled to work." (Appendix D, pages D-1 through D-28; emphasis added.)

The Company advised the Union that it did not intend to comply with the arbitration award since the arbitrator had exceeded his authority under the contract. On September 19, 1980, the Union filed this action in the United States District Court for the Western District of Texas, San Antonio Division, to enforce the arbitration award. The action was brought pursuant to Section 301 of the National Labor Relations Act, 29 U.S.C. § 185 which grants original jurisdiction of such actions to the District Court. The Company timely filed its answer and a motion for summary judgment. The Union filed a cross-

motion for summary judgment. By Order dated September 30, 1982, the District Court denied the Company's Motion for Summary Judgment and granted the Union's Cross-Motion for Summary Judgment. Although the District Court enforced the arbitration award, the Court noted in its Order that the award did contain a "possible ambiguity." (Appendix B, page B-3.)

The Company timely perfected its appeal to the United States Court of Appeals for the Fifth Circuit which issued its opinion on September 26, 1983, affirming the District Court's enforcement of the arbitration award. (Appendix A) The Company timely filed its Petition for Rehearing and Suggestion for Rehearing En Banc which were denied by the Court of Appeals by Order dated November 7, 1983. (Appendix C, page C-3.)

ARGUMENT AND AUTHORITY

Substantive Law to be Applied

The substantive law to be applied in Section 301 actions is the federal labor law fashioned by the Courts from the policy of our national labor laws. Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d. 972, 40 LRRM 2113 (1957).

Arbitration and Freedom of Contract

A fundamental principle of the National Labor Relations Act is the freedom of contract. This fundamental principle was made abundantly clear in the legislative reports accompanying the 1935 Act:

> The Committee wishes to dispell any possible false impression that this Bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.

S. Rep. No. 573, 74th Cong., 1st Sess., 12 (1935). In NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 1 LRRM 703 (1937), this Court reaffirmed that fundamental principle:

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. . . .The theory of the Act is that free opportunity for negotiation with an accredited represenative of employees . . .may bring about the adjustments and agreements which the Act in itself does not attempt to compel.

Notwithstanding these congressional and judicial assurances, Congress in 1947 amended the statute in order to statutorily guarantee this freedom of contract. More particularly, in 1947 Congress amended the statute to provide in Section 8(d) that: "For the purposes of this Section, to bargain collectively . . . does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). This

Court has strictly interpreted and applied Section 8(d) and has held that neither the NLRB nor the courts may, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements. NLRB v. American National Insurance Company, 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed. 1027, 30 LRRM 2147 (1952); H.K. Porter v. NLRB, 397 U.S. 99, 90 S.Ct. 821, 25 L.Ed.2d. 146, 73 LRRM 2561 (1970).

While federal labor policy favors arbitration of labor disputes, the freedom of contract principle may not be disregarded in the interest of labor arbitration. This Court has held that arbitration itself is a matter of contract, and a party cannot be required to submit to arbitration any dispute which it has not agreed to submit. Atkinson v. Sinclair Refining Co., 370 U.S. 238, 82

S.Ct. 1318, 8 L.Ed.2d. 462, 50 LRRM 2433 (1962); Iowa Beef Packers, Inc. v. Thompson, 405 U.S. 228, 92 S.Ct. 8591, 31 L.Ed.2d. 165, 20 WHC 488 (1972); Buffalo Forge Co. v. United Steel Workers of America, 428 U.S. 397, 96 S.Ct. 3141, 49 L.Ed.2d. 1022, 92 LRRM 3032 (1976).

Finally, the arbitrator is bound to and limited by the express terms of the parties' collective bargaining agreement.

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of the problem. . . . Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

United Steel Workers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, at 597, 80 S.Ct. 1358, 4 L.Ed.2d. 1424, 46 LRRM 2423, at 2425 (1960).

Contractual Limitations

The parties' collective bargaining agreement did not authorize arbitration of all disputes between the parties. Rather, the contract was very specific and limited arbitrable grievances to those arising out of the interpretation and application of the collective bargaining agreement itself. More particularly, Article VII, Section 1 of the parties' collective bargaining agreement provided in relevant part:

> A grievance is hereby defined as a claim or dispute regarding the interpretation or application of the terms of this Agreement.

(Appendix E, page E-1; Record on Appeal, page 20; emphasis added.)

Further, the arbitrator was limited in his decision to the expressed written terms of the collective bargaining agreement. Article VII, Section 10 of the parties' collective bargaining agreement provided in relevant part:

> The arbitrator selected must be an attorney experienced in the interpretation of contracts and the rules of evidence. He shall be limited in his decision to the expressed terms of this Agreement and the grievance presented, and he shall no authority to add to, subtract from, alter or modify in any manner the specific written terms of this Collective Bargaining Agreement.

(Appendix E, page E-2; Record on Appeal, page 22; emphasis added.)

Finally, Article XXIV of the parties' collective bargaining agreement provided in relevant part:

> This Agreement constitutes the entire agreement between the parties and supercedes all other agreements, written or oral, if any, heretofore made, and both parties acknowledge that all matters which could have been the subject of collective bargaining between the parties have been explored and that no such matter shall be revived, or presented, during the term of this Agreement.

(Appendix E, page E-2 and E-3; Record on Appeal, page 44.)

The arbitrator completely ignored the contractual limitations placed upon his authority. The arbitrator's own words manifested his infidelity to his contractual obligation. Preliminarily, in agreement with the Company, the arbitrator found that the collective bargaining agreement contained no provision governing the recall rights of striking employees. Not to be deterred by this contractual deficiency, the arbitrator looked beyond the parties' contract and based his decision upon what

he found to be a "tacit" agreement. More particularly:

> While the Collective Bargaining Agreement contains no provision governing the recall rights of striking employees, a serious question exists as to whether a tacit agreement was reached by the parties.
>
> * * *
>
> The basis for this decision is the existence of a tacit agreement by the Company that all striking employees would be recalled to work.

(Appendix D, page D-19 and D-26; Record on Appeal, pages 52 and 55; emphasis added.)

The arbitrator completely ignored the restrictions upon his authority found in the parties' collective bargaining agreement. First, he found that the parties' contract did not govern the recall rights of strikers. Finding no authority in the contract, he looked beyond the parties' contract and based his decision upon what he found to be a "tacit" agreement. This he was without authority

to do. Article VII, Section 1 of the parties' contract limited arbitrable grievances to the interpretation and application of the parties' written collective bargaining agreement. (Appendix E, page E-1; Record on Appeal, page 20.) Further, Article VII, Section 10 of the parties' contract restricted the arbitrator in his decision to the expressed terms of the written collective bargaining agreement. (Appendix E, page E-2; Record on Appeal, page 22.)

"Tacit" is an adjective derived from the Latin verb tacere meaning "to be silent." Tacit means to express or carry on without words or speech; to imply or indicate but not actually express; arising without express contract or agreement. Webster's New Collegiate Dictionary, 7th Edition, G. and C. Merriam Company, Publishers, 1972. The wisdom of avoiding misunderstandings by memorializing

agreements in writing is at least as old in our jurisprudence as the ancient English statute of frauds. The parties manifested the wisdom of memorializing their agreements in writing by the language of the collective bargaining agreement. The parties specified in their collective bargaining agreement that grievances were limited to the interpretation and application of the expressed written terms of the parties' contract. Further, the parties in their collective bargaining agreement limited the arbitrator in his decision to the expressed terms of the parties' written contract. Finally, the parties concluded their collective bargaining agreement with the following provision: "This Agreement constitutes the entire agreement between the parties and supercedes all other agreements written

or oral . . ." (Article XXIV; Appendix E, page E-2 - E-3; Record on Appeal, page 44.)

Notwithstanding the arbitrator's complete disregard of these contractual limitations upon his authority, the District Court merely noted in passing that there seemed to be a "possible ambiguity" in the arbitrator's opinion, but nevertheless, enforced the arbitration award. (Appendix B) With all due respect, the Court of Appeals completely obfuscated the issue. First, the Court of Appeals gratuitously concluded that the arbitrator had found that the "tacit" agreement was "part of the collective bargaining agreement for purposes of the grievance procedure." (Appendix A, page A-20; 715 F.2d. at 891.) (A reading and re-reading of the arbitrator's opinion fails to reveal such a finding.) Incredibly, the Court of Appeals then proceeded to conclude that

as a matter of law a strike settlement agreement, albeit tacit, was arbitrable unless "the parties in terms" specifically withdrew the agreement from the grievance and arbitration procedure. (Appendix A, page A-20-21; 715 F.2d. at 891)

> We find this contention to be unrealistic and unacceptable in the well-established context of labor-management grievance procedures and the arbitration of labor disputes. The contention of Ingram is that an arbitrator exceeds his or her authority when the decision is made that a strike settlement [tacit] agreement concluded at the same time as a new collective bargaining agreement is part of the collective bargaining agreement for purposes of the grievance procedure. The many reported arbitration cases, however, show that only if the parties in terms withdraw provisions of the strike settlement from the grievance procedure and arbitration is such a separation of the two agreements achieved. The published arbitration reports are full of cases in which, just as in this case, the arbitrator has treated strike settlement agreements as part of the collective bargaining agreement for purposes of the grievance procedure and arbitration, absent such a specific withdrawal provision.

(Appendix A, page A-20-21; 715 F.2d. at 891.)

Rule 17.1(c)

The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. (U.S. Supreme Court Rule 17.1(c).)

This Court has held that arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which it has not agreed to submit. Atkinson v. Sinclair Refining Co., supra. The decision of the Court of Appeals is in direct conflict with this principle. The Court of Appeals held, in effect, that a strike settlement agreement was arbitrable as a matter of law unless the parties had specifically excluded it from the contractual procedure. This holding by the Court of Appeals is in direct conflict with previous decisions of this Court that arbitration is a matter of

contract, and that a party cannot be required to submit to arbitration any dispute which it has not agreed to submit. Atkinson v. Sinclair Refining Co., supra.

Further, assuming arguendo the correctness of the Court of Appeals rationale, it is undisputed that in the case sub judice the parties specifically excluded all tacit agreements from their contractual grievance and arbitration procedure. Specifically, Article VII, Section 1 of the parties' collective bargaining agreement limits an arbitrable grievance to "a claim or dispute regarding the interpretation or application of the terms of this Agreement." (Appendix E, page E-1; Record on Appeal, page 20.) Article VII, Section 10 of the parties' collective bargaining agreement provides that the arbitrator "shall be limited in his decision to the expressed terms of this Agreement and the grievance

presented, and he shall have no authority to add to, subtract from, alter or modify in any manner the specific written terms of this Collective Bargaining Agreement." (Appendix E, page E-2; Record on Appeal, page 22.) Article XXIV of the parties' collective bargaining agreement provides that the written collective bargaining agreement "constitutes the entire agreement between the parties and supercedes all other agreements, written or oral." (Appendix E, page E-2; Record on Appeal, page 44.)

Finally, it is clear that the arbitrator has disregarded the limitations placed upon his authority by the parties' contract. His own words manifest his infidelity to limit himself to the written terms of the parties' contract. His award does not draw its essence from the parties' contract, but is based, in his own words, upon a "tacit"

agreement beyond the contract. Accordingly, the Court of Appeals enforcement of the Award is in conflict with this Court's decision in United Steel Workers of America v. Enterprise Wheel & Car Corp., supra.

Conclusion

A fundamental principle of the National Labor Relations Act is freedom of contract. Further, it is a fundamental principle of federal labor law that arbitration is a matter of contract. A party cannot be compelled to arbitrate any dispute which it has not agreed to arbitrate. Atkinson v. Sinclair Refining Co., supra. An arbitrator is confined to interpretation and application of the collective bargaining agreement. He does not sit to dispense his own brand of industrial justice. His award is legitimate only so long as it draws its essence from the collective bargaining

agreement. When the arbitrator's own words manifest his infidelity to this obligation, courts have no choice but to refuse enforcement of the award. United Steelworkers of America v. Enterprise Wheel & Car Corp., supra.

In the case sub judice, the parties' contract limited arbitrable grievances to interpretation and application of the written contract. The contract specifically limited the arbitrator in his decision to interpretation and application of the expressed terms of the written collective bargaining agreement. Notwithstanding these restrictions and contractual limitations, the arbitrator ignored the contract and based his decision upon a "tacit" agreement beyond the four corners of the parties' contract. This he was without authority to do. Accordingly, this Court should grant this Petition for Writ of Certiorari and upon

final resolution, deny enforcement of the arbitration award.

Respectfully submitted,

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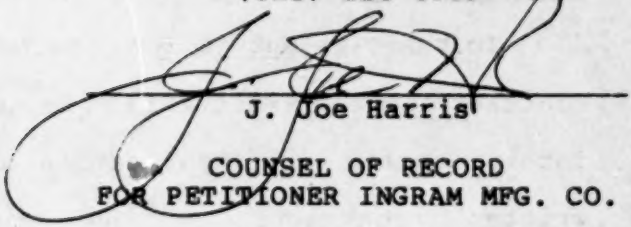
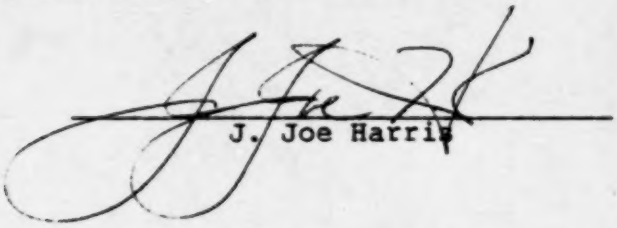


J. Joe Harris

COUNSEL OF RECORD
FOR PETITIONER INGRAM MFG. CO.

CERTIFICATE OF SERVICE

On this the 13th day of February, 1984, I hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari were mailed by United States certified mail, return receipt requested to Mr. Frank Herrera, Jr., Attorney At Law, 115 Villita, San Antonio, Texas, 78205, Attorney for IUE and its Local 1013.



J. Joe Harris

APPENDIX "A"

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, and its Local 1013, Plaintiff-Appellees,

v.

INGRAM MFG. CO., Defendant-Appellant.

No. 82-1544
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

September 26, 1983.

Appeal from the United States District Court for the Western District of Texas.

Before RUBIN, JOHNSON and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

This case involves a suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to enforce a labor arbitration award made under a collective bargaining agreement and an alleged strike settlement agreement. The

International Union of Electrical Workers (the Union) is plaintiff-appellee and Ingram Mfg. Co. is defendant-appellant. The district court denied the Union's contention that the statute of limitations had run on Ingram's right to contest enforcement of the award, but on the merits granted summary judgment for the Union enforcing the award. Ingram appeals, and we affirm.

The labor arbitration award in question was handed down on June 16, 1980. On September 19, 1980, the Union filed suit under Section 301, LMRA, 29 U.S.C. § 185, to enforce the award. On October 6, 1980, the defendant-employer filed its answer contending that the award was not enforceable on grounds that the arbitrator had exceeded his authority, resulting in an award which did not draw its essence from the collective bargaining agreement. The Union replied by moving to strike

Ingram's affirmative defenses on the ground limitations had run. Both parties moved for summary judgment.

LIMITATIONS

We turn our attention first to the issue of the applicable period of limitations. This is a straightforward case under Section 301 of a union seeking to enforce an arbitration award and the company refusing to abide by the award. The Union asserted in the district court that the limitations period provided for in either the Federal Arbitration Act, 9 U.S.C. § 12, or the Texas General Arbitration Act, Tex.Stat.Ann. art. 237(B), was applicable. Each of those statutes provides a ninety day limitation upon a suit to set aside an arbitration award. Ingram contended that either the six months limitation period of Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), or the general four

year Texas Statute of Limitations, Tex.Stat.Ann. 5529, was applicable.

The district court found that limitations had not run on Ingram's affirmative defenses. The Union has appealed this decision. On May 12, 1983, we notified the parties that we were withholding final decision in this case because of two cases in which the United States Supreme Court had granted certiorari. Both of those cases involved suits which related in substantial measure to the limitations issues in the enforcement of arbitrtion awards. The decisions in those cases have now been rendered sub nom. DelCostello v. Intl. Bhd. of Teamsters, ____ U.S. ____, 103 S.Ct. 2281, 76 L.Ed.2d. 476 (1983). We find that the decisions of the Supreme Court are not controlling as to this case. DelCostello and its companion case involved suits brought by individual

employees against the employer and the union challenging the outcome of grievance procedures and arbitration. The suits against the employer were for breach of contract under Section 301, LMRA. The fair representation suits against the union arose in the implied right to bring such suits under the National Labor Relations Act. Vaca v. Sipes, 386 U.S. 171, 177, 188, 87 S.Ct. 903, 910, 915-16, 17 L.Ed.2d. 842 (1967).

In DelCostello, the Court held that in such cases, the typically short limitations period contained in arbitration acts in the various states should not apply. Instead, the six months limitation period for unfair labor practices under the National Labor Relations Act, Section 10(b), was the most analogous and useful limitations period. Holding that the six months period should be applied in suits brought by employees,

the Court pointed out that the importance of having a uniform statute of limitations applicable to both employer and union. Such cases involve claims against the employer in the nature of a breach of contract suit and against the union for lack of fair representation, which, if treated separately, would call for a different limitations period. Further, such suits might or might not involve arbitrations, making limitations in arbitration statutes only sometimes applicable.

For our purposes, the significant aspect of the Supreme Court's opinion in DelCostello is to be found in the recognition that it was distinguishing cases brought by employees attacking both the employer and the union for failing to deal with them fairly from the typical cases of a union or employer suing to vacate a labor arbitration award. In the

latter kind of case, the Court accepted the general principle that the state limitations contained in state arbitration statutes should be the analogous limitations period made applicable in such lawsuits. DelCostello, supra, 103 S.Ct. at 2287, 2289. The Supreme Court decision, therefore, reinforces such holdings as Chauffeurs, Teamsters, Warehousemen, and Helpers, Local Union 135 v. Jefferson Trucking Co., 628 F.2d. 1023 (7th Cir, 1980), cert. denied, 449 U.S. 1125, 101 S.Ct. 942, 67 L.Ed.2d. 111 (1981). Jefferson Trucking involved the factual pattern of the principal case. The union sued to enforce an award after the company had refused to obey the award and had not brought suit to set it aside. The Court applied the Uniform Arbitration Act, as adopted in Indiana. It found that the company, having failed to sue to vacate the award within

ninety days as provided in that statute, could not later attack the award as invalid in the union's suit to enforce the award.

The reasoning of Jefferson Trucking does not control our case, however. Since DelCostello does not control the limitations periods applicable to suits to vacate an arbitration award by the union or employer party to that award, we do look to the Texas General Arbitration Statute. The critical difficulty immediately arises because the Texas General Arbitration Statute has an uncommon provision that in terms makes the statute inapplicable to any collective bargaining agreement between an employer and a labor union. Tex.Rev.Civ.Stat.Ann. art. 224(a).

It has been regularly assumed that the limitations period in the Federal Arbitration Act does not apply to labor cases for the same reason. The statute

in terms provides that it is not applicable to contracts involving employees in interstate commerce. Thus, this same obstacle to using the state ninety day limitations period of the Texas General Arbitration Act is created by provision of the Texas law withdrawing the statute from applicability to labor disputes.

We have controlling law in this Circuit on this point. Edwards v. Sea-Land Service, Inc., 678 F.2d. 1276 (5th Cir, 1982), involved the same factual situation as that in the DelCostello case. Employees brought actions against the employer and the union to set aside an arbitration award in favor of their former employer. The suit against the employer rested on a claim of breach of the agreement and against the union on a claim of a breach of its duty of fair representation. After careful consideration we found that the six months

limitation of Section 10(b) of the National Labor Relations Act did not apply. DelCostello changes this conclusion because Sea-Land Service did involve an employee suit against employer and union. The limitations period in such suits is now six months as derived from Section 10(b) of NLRA.

Since in Sea-Land we rejected the six months NLRA limitations period, we went on to consider what statutory period would be applicable in a suit to set aside an arbitration award. Prior authority looked to arbitration statutes for the appropriate limitations period. We found that the three months limitation period of the Federal Arbitration Act did not apply because the Act specifically excludes contracts of employment involving any employees engaged in foreign or interstate commerce, 9 U.S.C. § 1.

We then turned our attention to the Texas statutes. The Texas General Arbitration Act is in large part an adoption of the Uniform Arbitration Act. However, as we pointed out earlier, the Texas Act added an amendment which provides that nothing in the Act applied to "[a]ny collective bargaining agreement between an employer and a labor union;" Tex.Rev.Civ.Stat.Ann art. 224(a). We, therefore, concluded in Sea-Land that the Texas General Arbitration Statute's ninety day limitations period for setting aside an arbitration award was not a "comparable limitations statute" because of the stated policy of the state making the Act and its limitations period inapplicable to labor disputes and collective bargaining agreements. We rejected the inapplicability of the ninety day limitations period of the Texas

General Arbitration Act, Sea-Land, supra, 678 F.2d. at 1289.

Sea-Land concluded that the Texas catch-all statute of limitations, Tex.Rev.Civ.Stat.Ann. art. 5529, which provides for a four year limitations period applied. We follow this holding as the controlling precedent. Under the applicable limitations period, therefore, Ingram's affirmative defenses to the Union's suit to enforce the arbitration award are timely. In summary, we hold in the light of the prior developed caselaw and the Supreme Court's analysis in DelCostello that the six months limitations period under the Labor Management Relations Act and the three months period under the Federal Arbitration Act are not applicable. The most closely comparable state limitations period, therefore, is the one which applies. In the case of Texas it is not

the ninety day limitations period under the Texas General Arbitration Act because by a restrictive amendment Texas withdraws the applicability of that entire statute from collective bargaining agreements and labor disputes growing out of them. Instead, in this case the general catch-all Texas limitations period of four years is applicable.

It follows that the district court was correct in finding the suit by the Union and the affirmative defenses filed by Ingram were not barred by limitations. We then proceed to the merits of the Union's suit to enforce the award and Ingram's affirmative defenses undertaking to establish that the award cannot legally be enforced.

MERITS

On the merits, Arbitrator John Caraway found that there was a "tacit" agreement between the parties upon the

settlement of the economic strike that all striking employees would be recalled regardless of the fact that some permanent replacements had been hired. He ordered that the grieving employees be reinstated and be awarded back pay from the date that they should have been reinstated under their seniority. One of the particular aspects of this case is that the new contract was made retroactive to the date of the expiration of the earlier contract, so that a collective bargaining agreement was in effect throughout the period in question including when the claimed strike settlement agreement was made. There was no hiatus.

Ingram makes two basic contentions. The first is that there was no agreement to reinstate all the strikers. Second, even if there was such an agreement, enforcement of the agreement was not subject to the arbitration process because

it was not part of the collective bargaining agreement which provides for the arbitration of grievances. Thus, the company argues that the arbitrator's award enforcing such a strike settlement agreement did not "draw its essence from the collective bargaining agreement". United Steel Workers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d. 1424 (1960).

It is well established, of course, that an employer may not discharge an economic striker. NLRB v. Intl. Van Lines, 409 U.S. 48, 52, 93 S.Ct. 74, 77, 34 L.Ed.2d. 201 (1972). Since early in the history of the National Labor Relations Act, however, it has consistently been held that an economic striker may be permanently replaced by the employer. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345, 58 S.Ct. 904, 910, 82 L.Ed. 1381

(1938). The company asserts that a number of permanent replacements were hired during the strike. Yet, at the end of economic strikes it is fairly common to make agreements to return all economic strikers to work in spite of the fact that there have been replacements. Absent such an agreement, those employees who were permanently replaced during the strike have no reinstatement rights. If they are reinstated by the company, they cannot claim seniority and other rights under the contract but are treated as new employees. See Arbitrator Volz' decision in Indiana Telephone Co., 73-2, CCH Lab.Arb. ¶ 8502 (1973).

A critical issue in this case, then, is whether an agreement to reinstate all the strikers was made. This contention of the Union is denied by the company. The issue is a factual one. Was there an agreement between the parties under which

the company promised to reinstate all strikers? Absent a showing of fraud or bias or prejudice, or reliance upon evidence which is so flimsy that fraud, bias, or prejudice can be inferred, the courts have no power to review the findings of fact of an arbitrator. There is no review on the record in the usual sense of the review of administrative decisions. The parties have chosen the arbitrator as the ultimate factfinder. In Amalgamated Meat Cutters and Butcher Workmen of North America, District Local No. 540 v. Neuhoff Bros. Packers, Inc., 481 F.2d. 817, 819 (5th Cir, 1973), we said, "The scope of judicial review of an arbitrator's award is extremely narrow: In order to promote the federal policy favoring settling of labor disputes by arbitration the factual and the legal accuracy of arbitrators' findings will not be reviewed." (Emphasis added). See also International U. of

Electrical, Radio & Machine Workers v. Markle Mfg. Co., 582 F.2d. 9, 10 (5th Cir, 1978).

Arbitrator Caraway in this case found that the Union had in writing proposed as part of the strike settlement that all the striking employees be returned to their jobs regardless of permanent replacement. He found further that the company orally agreed to this and immediately began to act in accordance with it. It was only after a few days that the company refused to follow the agreement. Not only did this experienced labor arbitrator find on these facts there was such an agreement between the parties, this exact same issue involving this same episode with the same parties was submitted to another experienced arbitrator, Ralph Barnhart, and he also found that such an agreement had been made. Ingram Mfg. Co., 80-2, CCH Lab.Arb. ¶ 8490 (1980). While the Barnhart

decision obviously does not control, it reveals again the reasonableness of the finding of the existence of the agreement by Arbitrator Caraway in this case. Under our limited power of review, we cannot upset Arbitrator Caraway's conclusion that such an agreement existed.

Ingram relies mainly upon a step-by-step contention which starts with the proposition that the agreement for reinstatement of employees was separate from the collective bargaining agreement. In turn, since the grievance procedure ending in arbitration is found in the collective bargaining agreement, there is no authority under which the arbitrator can act in applying the strike settlement agreement. The arbitrator, therefore, departed from the limitation in the collective bargaining agreement that requires him to confine his jurisdiction to the provisions of "this agreement" (the

collective bargaining agreement). The final step, then, in this step-by-step analysis is that his award did not "draw its essence from the collective bargaining agreement." Enterprise Wheel & Car, supra, 363 U.S. at 597, 80 S.Ct. at 1361.

We find this contention to be unrealistic and unacceptable in the well-established context of labor-management grievance procedures and the arbitration of labor disputes. The contention of Ingram is that an arbitrator exceeds his or her authority when the decision is made that a strike settlement agreement concluded at the same time as a new collective bargaining agreement is part of the collective bargaining agreement for purposes of the grievance procedure. The many reported arbitration cases, however, show that only if the parties in terms withdraw provisions of the strike settlement from the grievance procedure

and arbitration is such a separation of the two agreements achieved. The published arbitration reports are full of cases in which, just as in this case, the arbitrator has treated strike settlement agreements as part of the collective bargaining agreement for purposes of the grievance procedure and arbitration, absent such a specific withdrawal provision.

But it is not for this Court to decide whether the collective bargaining agreement and the simultaneous strike settlement are to be treated together. Our powers of review are far more restrictive. It is established that the power to interpret the collective bargaining agreement between the parties has been given to the arbitrator and is not for the court to second guess. The United States Supreme Court made this clear in the famous Trilogy of cases

decided all the same day which laid the foundation for the modern law of judicial review of labor arbitration. United Steel Workers of America v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d. 1403 (1960); United Steel Workers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d. 1409 (1960); United Steel Workers of America v. Enterprise Wheel & Car Co. 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d. 1424 (1960). In Enterprise Wheel & Car, the Supreme Court said:

> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their

interpretation of the contract is different from his. (363 U.S. at 599, 80 S.Ct. at 1362).

As we have said elsewhere "if the subject matter of the dispute is arguably arbitrable (resolving all doubts in favor or coverage), then it is for the arbitrator to decide whether or not the dispute may be arbitrated." Alabama Power Company v. Local Union No. 391, 612 F.2d. 960, 963 (5th Cir, 1980).

We get further guidance on this issue from the Warrior & Gulf case. In that case the Supreme Court told us that the role of the arbitrator is broader than applying the precise wording of the contract. The arbitrator is also chosen to exercise "his knowledge of the common law of the shop". 363 U.S. at 582, 80 S.Ct. at 1352. It is difficult to deny the proposition that a strike settlement agreement concluded simultaneously with a

new collective bargaining contract is part of the common law of the shop.

Finally, we are told in Warrior & Gulf that "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute. Doubts should be resolved in favor of coverage." 363 U.S. at 582, 80 S.Ct. at 1353. In International Assn. of Heat & Frost Insulators & Asbestos Workers, Local 66 v. Leona Lee Corp., 489 F.2d. 1032, (5th Cir,), cert. denied, 419 U.S. 829, 95 S.Ct. 51, 42 L.Ed.2d. 54 (1974), we said a court: "cannot review the merits of the award, even in deciding the question of arbitrability, nor can the court attempt to interpret the collective bargaining agreement." See also in general, Local No. 370, Bakery, Confectionary & Tabacco Workers Intl. U.

v. Cotton Bros. Baking Co. 672 F.2d. 562, 564 (5th Cir, 1982); Waverly Mineral Products Co. v. United Steel Workers of America, 633 F.2d. 682, 684 (5th Cir, 1980); Safeway Stores, Inc. v. American Bakery & Confectionary Workers Intl. U. Local 111, 390 F.2d. 79, 81 (5th Cir, 1968).

With our limited function of review, we cannot conclude Arbitrator Caraway moved outside the provisions of the contract. There is much support in industrial relations for his interpretation that a strike settlement agreement is related to, and insofar as is necessary, is a part of the collective bargaining agreement between the parties. In turn, the grievance procedure is applicable, unless the parties by agreement have withdrawn it from the particular kind of case.

We are in full agreement with the district court that neither the suit to enforce the arbitration award nor the affirmative defenses opposing enforcement are barred by limitations. We are also in agreement with the district court that on the merits the award should be enforced in full.

A final matter remains. The Union asserts that the district court erred in failing to award attorney's fees for its costs in pursuing this suit. It takes the position that, at a minimum, the case should be remanded to the district court for a specific finding as to whether or not such fees should be awarded. We have held that there can be recovery of attorney's fees in Section 301 causes of action. International Assn. of Machinists and Aerospace Workers v. Texas Steel Co., 538, F.2d. 1116, 1121 (5th Cir, 1976). However, such fees are awardable only when

it is determined that a party has without justification refused to abide by the award of the arbitrator. International U. of Dist. 50, United Mine Workers v. Bowman Transportation, Inc. 421 F.2d. 934, 935 (5th Cir, 1970).

No specific finding by the district court is necessary in this case to establish that Ingram had reasonable ground to advance the position that the arbitration award was not binding. There was a genuine dispute as to the scope and interpretation of the strike settlement agreement between the parties concerning the reinstatement of striking employees. The company's contentions were not frivolous and unjustified. This is enough to sustain the district court in deciding in its discretion not to award attorney's fees. See Dallas Typographical U. No. 173 v. A.H. Belo Corp., 372 F.2d. 577, 583 (5th Cir, 1967). We do not upset the

district court's exercise of discretion in this matter.

It follows that the order of the district court should be affirmed in full.

AFFIRMED.

APPENDIX "B"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Filed September 30, 1982 - Charles W. Vagner, Clerk by CRW Deputy]

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, AND ITS LOCAL 1013	§	
PLAINTIFFS,	§	CIVIL ACTION NO. SA-80-CA-488
VS.	§	
INGRAM MFG. CO.,	§	
DEFENDANT.	§	

ORDER

On December 7, 1981, the Court entered a Default Judgment for Defendant INGRAM MANUFACTURING COMPANY, after the counsel for Plaintiffs INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, and its LOCAL 1013 failed to appear for a docket call.

On December 10, 1981, Plaintiffs filed a Motion to Reconsider, and on December 23, 1981, the Court signed an order granting Plaintiffs' motion to reconsider and withdrawing its Judgment of December 7, 1981.

The Court thereafter considered the following motions filed by the parties in this cause:

(1) Plaintiff's Motion to Strike Defendant's Affirmative Defenses;

(2) Defendant's Motion for Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment.

After considering the pleadings and case authority relating to Plaintiff's Motion to Strike, the Court is of the opinion that said motion should be denied.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that Plaintiffs' Motion to Strike is DENIED.

Having reviewed the Defendant's Motion for Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment, the Court is of the opinion that Defendant's Motion for Summary Judgment should be denied and Plaintiff's Cross-Motion for Summary Judgment should be granted. The Court finds that the arbitrator was within the scope of his powers in finding the dispute arbitrable. Under the authority of United Steel Workers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960), the Court finds that possible ambiguity in the arbitrator's opinion as to the basis for his award does not provide sufficient reason for refusing enforcement of the award.

It is, therefore, ORDERED, ADJUDGED and DECREED that Defendant's Motion for Summary Judgment is hereby DENIED, and

Plaintiffs' Motion for Summary Judgment is hereby GRANTED.

The Court further ORDERS that Plaintiff's pay the Defendant Two Hundred and Fifty ($250.00) Dollars in costs and attorney's fees, occasioned by the failure of Plaintiffs' counsel to appear at a docket call held on December 7, 1981.

Signed and entered this 30 day of September, 1982.

_____

FRED SHANNON,
United States
District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Filed October 4, 1982. Charles W. Vagner, Clerk, By LDH Deputy]

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, AND ITS LOCAL 1013

VS. CRIMINAL [SIC] ACTION: 80-488

INGRAM MANUFACTURING COMPANY

JUDGMENT

This action came on for consideration before the Court, Honorable Fred Shannon, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered.

It is, therefore, ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is hereby denied, and Plaintiffs' Motion for Summary Judgment is hereby granted. The Court further

orders that Plaintiffs pay the Defendant $250.00 in costs and attorney's fees, occasioned by the failure of Plaintiffs' counsel to appear at a docket call held on December 7, 1981.

DATED at San Antonio, Texas, this 30th day of September, 1982.

CHARLES W. VAGNER,
CLERK
UNITED STATES
DISTRICT COURT

By: L. Holliday
Deputy

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 82-1544
Summary Calendar

D. C. Docket No. SA-80-CA-488

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, and its Local 1013,

Plaintiffs-Appellees

,

versus

INGRAM MFG. CO.,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

Before RUBIN, JOHNSON and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 34;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District

Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that the defendant-appellant pay to the plaintiffs-appellees the costs on appeal, to be taxed by the Clerk of this Court.

September 26, 1983

ISSUED AS MANDATE: November 17, 1983

A true copy

Attest GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By: K. Armato
Deputy

November 17, 1983
New Orleans, Louisiana

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 82-1544

* * *

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing En Banc, (Federal Rules of Appellate Procedure and Local Rule 35) the suggestion for rehearing En Banc is DENIED.

November 7, 1983

Entered for the Court.

Jerre S. Williams
U. S. Circuit Judge

APPENDIX "D"

INGRAM MANUFACTURING COMPANY

-AND-

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, AND ITS LOCAL 1013

RE: File No. 80K/02404
Grievance No. 104

APPEARANCES

FOR THE COMPANY:

Manitzas, Harris & Padgett by
Joe Harris, Attorney

FOR THE UNION:

Hardberger & Herrera by
Frank Herrera, Jr.

ARBITRATOR:

John F. Caraway, selected from a panel of the Federal Mediation and Conciliation Service.

In December, 1978 the Union and the Company commenced negotiations toward a new collective bargaining agreement. The existing contract expired on January 31, 1979. (Tr. 31-32). On March 26, 1979, 155 employees went out on strike. The total work force was approximately 200

employees. (Tr. 12-13). Contract negotiations continued during the period of the strike.

The strike ended on or about August 24, 1979. The new labor contract was made retroactive from February 1, 1979. (Joint Exhibit No. 1).

During the course of the strike, the Union filed an unfair labor practices charge against the Company with the National Labor Relations Board, contending that the Company was bargaining in bad faith in violation of Section 8(a)(5) of the National Labor Relations Act. A unilateral settlement agreement was entered into with the Company on June 12, 1979. It provided in part that the Company was "--- to offer reinstatement to the current strikers who apply for reinstatement who were not permanently replaced prior to June 2, 1979." (Company Exhibit No. 15). The primary blockage to

a contract was money issues and a journeyman issue. (Tr. 35). In July 1979 Mr. Javior and Mr. Harris, held a negotiation session. Mr. Javior stated that Mr. Harris advised him that the Company desired a contract and for the employees to return to work inasmuch as the Company was eighteen months behind in production. (Tr. 37).

Mr. Javior explained that the critical day in the contract negotiations occurred on Friday, August 24, 1979. He stated that he advised the Mediator that if the Company would drop the journeyman issue and agree to the other items, the strike committee would recommend the contract to the membership. (Tr. 38). Approximately one hour later the Mediator returned to advise the Union committee that the Company agreed to drop the journeyman issue and the economic issues were agreed to. The committee then advised

the Mediator that it would recommend ratification of the contract to the membership. (Tr. 58) At the end of the meeting Mr. Javior tendered to Mr. Harris a letter offering all strikers unconditionally back to work.

Mr. Javior stated that Mr. Harris' response to the hand written note was "very good". (Tr. 40). Later in the day Mr. Javior telephoned Mr. Harris to state "We do have an agreement." He said that the Union membership would meet and receive the committee's recommendation that they accept the contract. Mr. Javior stated that the people would return to work on Tuesday to work. Mr. Javior testified that Mr. Harris' reply was give me until Monday to explain to the Company. (Tr. 41). August 24, 1979 was a Friday. Mr. Javior gave Mr. Harris three telephone numbers where he could be reached on Monday should additional information or problem

arise. (Tr. 41) On Monday the Union membership met and ratified the contract. The Union leadership advised its membership that all would be back to work on Tuesday. (Tr. 41)

On Tuesday morning, August 28, 1979, Mr. Harris telephoned Mr. Javior at his home and asked him what Mr. Javior was doing. (Tr. 42). Mr. Harris explained that the street at the Plant was full of employees desiring to go back to work. (Tr. 42). Mr. Javior stated that he explained to Mr. Harris he had advised him the employees would return to work on Tuesday and if this was not agreeable, that he had given him three telephone numbers where he could be reached on Monday to talk about the situation. According to Mr. Javior, Mr. Harris stated that he forgot to call him on Monday. Mr. Harris also said that Mr. Mendoza, the Chief Foreman, desired time to work out a

schedule for recalling employees. (Tr. 43).

Later in the day on Tuesday, August 28, Mr. Javior met with Mr. Norris, the Union's President. Mr. Norris advised Mr. Javior that only three or four employees had returned to work and the others had been sent home. (Tr. 45). The Company then agreed to return all of the Union officers to work.

On Friday, August 30, 1979, Mr. Javior talked to Ms. Ybanez. He had thirty-five to forty employees in his office who were complaining they had not been returned to work. She explained that a list was going out for recall of employees on Tuesday, the day after Labor Day. (Tr. 48). She said it would be worked out. (Tr. 48).

Mr. Javior stated that he filed an unfair labor practice charge with the National Labor Relations Board alleging

Company discrimination against the unrecalled strikers. (Tr. 49). The Board's reply was that the problem was one of contract violation and not one within the jurisdiction of the Board. (Joint Exhibit No. 7). The Union's primary complaint was that the Company had not returned or indicated that it would return all of the striking employees to work. When advised by the Board that it was a contract violation, the instant grievance was filed. (Joint Exhibit No. 2).

The grievance had as an attachment a list of employees who were not recalled to work and who claimed they should have been recalled by reason of their seniority. It was stipulated at the arbitration hearing that if the labor contract applied to the grievance and the ruling was made that seniority governed, then these grievants should be reinstated,

provided they were senior to the employees who did not participate in the strike or were hired during the strike period.

Ms. Ybanez in her testimony stated that on Monday, August 27, 1979 the Company released approximately nineteen employees who had less plant-wise seniority than those employees who were then currently on the Company's payroll. This was done to accommodate the recalled striking employees. (Tr. 115). Subsequent to August 27, the Company released an additional two non-striking employees. (Tr. 116). This left a total of twenty-one non-striking employees who had been released. (Tr. 116). She explained that those employees released were the one who were hired after June 2, 1979, which was the date that the National Labor Relations Board stated that the strike was an unfair labor practices strike as opposed to being an economic strike.

The Company recalled Ms. Tapia on or about January 30, 1980. Messrs. Jimenez, Garza and Torres served notice on the Company that they quit and had no further desire to return to work. (Tr. 13-15). As to the remainder of the persons on the list attached to the grievance, the Company announced they would be recalled based upon their seniority and ability, when a vacancy arose.

In its grievance, the Union asked that the employees listed on the grievance be reinstated according to their seniority and made whole for all lost wages.

CONTRACT PROVISIONS INVOLVED

ARTICLE VI - SENIORITY

Section 1. Seniority will first be on a department basis, then plant-wide subject to the provisions herein.

Section 2. Seniority and ability of the individual employee shall be the determining factors in the selection of employees for advancement, promotion, demotion, transfers, layoffs and recalls. The comparative

ability of individual employees shall be determined by Management. If several employees are considered to be qualified, Management shall have the right to determine which of the employees is "more qualified". If the comparative ability of several individuals is considered to be equal, seniority shall prevail. The employees selected for advancement, promotion or transfer shall be given a thirty (30) day trial period following his or her selection. Thereafter, all employees shall retain the right to file grievances over Management decisions made pursuant to this Section.

Section 3. In the event two or more employees share the same anniversary date, and their comparative ability is considered to be equal, the older employee shall be considered the more senior.

Section 4. For the purposes of this Article, the departments shall be: Assembly-Maintenance Department; Machine Shop Department; Fabrication and Welding Shop Department; Wire Cloth (Screen Shop) Department; Paint Shop Department; Parts Department; Drafting and Blueprint Department; Sand and Gravel Department.

Section 8. Layoffs may be effected either plant-wide or department-wide within the discretion of the Company, subject to the provisions herein. Nothing contained in this Agreement shall be construed to provide to any

employee interdepartmental "bumping rights"; ie., employees laid off within any department shall not have the right to displace less senior employees in other departments. While it is understood that laid off employees do not have the right to displace employees in other departments, the Company will utilize laid off employees in available jobs in other departments for which the employees can then be utilized. Further, the Company agrees to refrain from hiring new employees in any department until laid off employees have been given the opportunity to fill such positions pursuant to the criteria set forth in Article VI, Section 2. Section 10. In the event of a layoff, advance notice will be given to the Union and affected employees. In no event, however, shall such notice be less than two (2) scheduled working days, except in the case of an emergency shutdown of the plant or any part thereof. An employee who is on layoff shall be responsible to keep the Company notified of his current mailing address.

ARTICLE VII - GRIEVANCE PROCEDURE

Section 1. A grievance is hereby defined as a claim or dispute regarding the interpretation or application of the terms of this Agreement. If a grievance occurs, a good faith effort will be made to settle such grievance promptly by using the following procedure.

ISSUES

I. Is the grievance arbitrable?

II. Did the Company violate the Collective Bargaining Agreement by failing to recall the employees listed on the attachment to the grievance?

ARGUMENT

I. Arbitrability

The Company maintains that the Collective Bargaining Agreement does not govern the recall rights of the striking employees. Federal Law governs. Under the decisions of the National Labor Relations Board employees who are striking do not occupy the same status as laid off employees. They therefore are not entitled to assert their seniority rights under the Labor Contract. Further, the Company never agreed to reinstate the striking employees in accordance with seniority under the labor contract.

The Union argues that the dispute is arbitrable. The grievance is defined as

a claim or dispute arising regarding the interpretation or application of the term of the labor agreement. This is particularly true in view of the agreement of the parties that the current contract be made retroactive to February 1, 1979. Under the Steelworkers Triology, the dispute is arbitrable.

II. Merits

The Union contends that the retroactivity of the contract gave effect to the seniority provisions of the contract and mandated that the Company recall the strikers listed in Joint Exhibit No. 2 attached to the grievance. The parties agreed that the contract would be made retroactive to February 1, 1979. Striking employees were not excluded from the purview of this retroactivity.

The Union maintains that the Company stated that all employees would be recalled upon ratification and execution

of the labor contract. The testimony of Mr. Javior demonstrates this.

When Mr. Javior advised the Company's chief negotiator that the employees would return to work, this did not bring any rejection from the Company but only a request that additional time be granted in order to work out the mechanics for the return of the strikers. The Union further points out that the Company recalled all of the Union officers to work. If the Company agreed to give retroactive effect for the purposes of recalling Union officers, there is no reason why the same right should not be granted to the striking employees.

Regarding the Company's defense that the employees were economic strikers who had been permanently replaced, the Union maintains that the Agreement to make the Collective Bargaining Contract retroactive rejects this defense. Under

the retroactivity agreement the seniority provisions were given full force and effect.

The Company contends that it did not classify the employees as being in a layoff status. They were considered as strikers and under the applicable law had no priority rights in a recall situation.

The Company never agreed that all striking employees would be returned to employment. The Company only desired to see an end to the strike and did agree that it would reinstate striking employees on the basis of available vacancies. There was never an agreement that current employees would be displaced by returning strikers.

With regard to the twenty non-strikers who were terminated, these employees were terminated because they were all hired after June 2, 1979. The reason for the Company's action was based

upon the settlement agreement made with the National Labor Relations Board. (Company Exhibit No. 13).

The Company argues that the retroactive nature of the contract does not overcome the lack of an express provision in the contract governing the recall rights of economic strikers. The Company made to express agreement whatsoever that the striking employees would be recalled in priority over retention of employees hired during the strike. The Company followed the law applicable to the instant case by reinstating employees when vacancies occurred and not discharging strike replacements to make room for the strikers.

DECISION

I. The grievance is arbitrable.

Article VII, Section I defines a grievance "as a claim or dispute regarding

the interpretation or application of the terms of this Agreement."

The instant dispute involves the question of whether the seniority rights of the unrecalled striking employees was violated by the Company's refusal to recall these employees to replace employees who worked during the strike. A periphery issue is whether the Agreement to give the contract a retroactive effect to February 1, 1979 mandated the recall of the striking employees. It is apparent, therefore, that the grievance does involve a question of interpretation and application of the Agreement and it is arbitrable.

In ruling that the dispute is arbitrable, the Arbitrator follows the principle enunciated by the Supreme Court in United Steel Workers of America vs. Warrior and Gulf Navigation Company, 363

U.S. 574, 582, S.Ct. 1347 (1960). The Court said:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

The Company relies upon a decision of the National Labor Relations Board in Bio-Science Laboratories, 209 NLRB 796. In that case, the Board agreed that the unreinstated strikers did not have the statutory right to recall in accordance with the contract provisions covering recalls from layoffs where the parties had not agreed to the application of such clause to the reinstatement of the strikers. Bio-Science Laboratories-supra, must be distinguished from the instant case in that the instant case there was discussions and an alleged oral agreement that the striking employees

would be reinstated. While the Collective Bargaining Agreement contains no provision governing the recall rights of striking employees, a serious question exists as to whether a tacit agreement was reached by the parties. The evidence surrounding the alleged oral agreement must be analyzed to determine whether or not the striking employees retained the right of recall.

II. The Company violated the Agreement by refusing to recall the striking employees whose names were set forth on the attachment to the grievance.

The defense of the Company is that the Collective Bargaining Agreement did not require the Company to recall the striking employees to replace non-striking employees. The Company argues that it made no agreement to effect such a replacement. As a result, the dispute

is governed by the following principle of law:

> "The law regarding an employer's duty to reinstate strikers is clear. Where employees engage in an economic strike, an employer must reinstate strikers who apply for reinstatement to positions which are vacant at the end of the strike or become vacant thereafter; but he need not discharge strike replacements to make room for the strikers."

National Business Forms, Inc. vs. NLRB, 457 F.2d. 737, 740-741, 79 LRRM 2945 (6th Cir, 1972).

The weakness of the Company's position is that the Company made a tacit agreement with the Union to recall all striking employees. The evidence proves this.

On Friday, August 24, 1979 agreement was reached on a new contract. Mr. Javior delivered to Mr. Harris a letter which read as follows:

"Please be advised immediately that the Union I.U.E. AFL-CIO Local 1013 hereby on behalf of the strikers offer them all unconditionally back to work."

Mr. Harris' reply was "Very good." (Tr. 40). There was no reservation that the striking employees would only be recalled when vacancies arose. There was a written offer for all employees to return to work. This offer was verbally accepted by the Company and affirmed by its subsequent actions.

Mr. Javior, after he had delivered the written offer, telephoned Mr. Harris to say that an agreement had been reached and that the employees would return to work on Tuesday, August 28. Mr. Harris' reply was that he needed Monday to explain to the Company. Mr. Javior gave Mr. Harris three telephone numbers where he could be reached to discuss any problems. (Tr. 41). No call was made by Mr. Harris.

There was no reservation or restriction as to the recall of the striking employees.

Mr. Javior presented the new contract to the Union membership for vote. The understanding was that all employees would be recalled. (Tr. 41). Mr. Javior instructed the Union membership, after the ratification vote, to report for work on Tuesday, August 28 or be counted absent.

On Tuesday morning, August 28, Mr. Harris telephoned Mr. Javior to protest a crowd of employees being at the plant. (Tr. 43). Mr. Javior explained that he had advised Mr. Harris that the employees would return to work on Tuesday, August 28 and to telephone him if there was a problem. (Tr. 43). Mr. Harris said that the Company needed until Friday to effect the recall of the employees. There was no mention that the striking employees would be recalled when vacancies arose.

The implicit understanding was that all employees were to return to work.

On Friday, August 31, 1979 Mr. Javior talked to Mrs. Ybanez. She said that it would take at least two weeks to straighten out the return to work. She did not qualify the return of the strikers. (Tr. 48)

Review of this evidence convinces the Arbitrator that the Company tacitly agreed to the recall of the striking employees. Mr. Javior made the Union's position known to the Company that all employees would be returned to work. In the conversations from August 24 through August 31 the Company did not restrict the recall of the strikers to fill vacancies as such vacancies arose. The Union had every reason to believe that the Company's intent was to return the striking employees to employment even though it meant displacing the non-striking employees. It is most doubtful that the

Union membership would have ratified the new agreement if the membership had known that the Company was not going to recall all striking employees at the end of the strike.

Further, the Company did not raise the defense that the employees listed as an attachment to the grievance, were economic strikers who had been replaced, until the Union filed the grievance on October 3, 1979. As late as September 10, 1979 the Company sent the employees a letter regarding their insurance coverage and used the phrase "while you are on layoff". (Joint Exhibit No. 10). The check-off list, for Union dues, as of September 27, 1979, had the status of the employees as "Laid-off". (Joint Exhibit No. 8).

The evidence shows that from August 24, 1979 to October 3, 1979 the employees listed in the grievance were treated as

in a laid-off status with no restriction as to their being recalled to work.

In addition, the Company recalled all of the Union officers to work. The officers were economic strikers just as the employees listed in the grievance. The officers were recalled without regard to filling vacancies, yet the remainder of the employees were denied recall until a vacancy arose. This act represented unequal treatment of the rank and file employees and supports the belief that recalling the striking employees only when vacancies arose was an after-thought on the Company's part.

The Company argues that it followed the settlement agreement made with the National Labor Relations Board by retaining only those employees hired prior to June 2, 1979. But the Company agreed to make the labor contract retroactive to February 1, 1979. By doing this the

seniority rights of the striking employees accrued without interruption from February 1, 1979. This weakens the Company's argument that the striking employees were not in a layoff status.

The ruling of the Arbitrator is that the Company must reinstate the employees listed on the grievance in accordance with their seniority.

The basis for this decision is the existence of a tacit agreement by the Company that all striking employees would be recalled to work. The agreement was constituted by the Union's written offer that all strikers would return to work and the Company's acceptance of the offer verbally and by its subsequent course of action. For that reason the legal principle of National Business Forms, Inc. vs. NLRB, supra, is not binding.

AWARD

I. The grievance is arbitrable.

II. The Company violated the Agreement by refusing to recall the striking employees whose names were set forth on the attachment to the grievance.

III. The employees listed on the attachment to the grievance shall be immediately reinstated provided they have the requisite seniority.

IV. Back pay shall be awarded to such employees who are reinstated at the appropriate rate of pay from August 31, 1979 to the date of their reinstatement.

V. That if Valentine Tapia was entitled to reinstatement based on seniority on August 31, 1979, this employee is entitled to back pay from August 31 to January 30, 1980.

VI. That if Robert Jimenez, Antonio Garza and Benito Torres were entitled to reinstatement based on seniority on August 31, 1979, they shall be paid back wages from August 31 to the date they gave notice

that they did not desire to work for the Company.

VII. There shall be deducted from any back pay all wages received by these employees in other employment, as well as any unemployment compensation benefits paid to these employees.

VIII. The Union claim for interest is rejected as being punitive in nature. The Company acted in good faith belief that the legal principle of National Business Forms, Inc. vs. NLRB, supra, did not require the Company to recall the striking employees.

New Orleans, Louisiana

June 16, 1980 John F. Caraway
Impartial Arbitrator

APPENDIX "E"

COLLECTIVE BARGAINING AGREEMENT

This Agreement by and between INGRAM MFG. CO., including ACME SAND AND GRAVEL COMPANY, hereinafter called the "Company," and INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, and its LOCAL 1013, hereinafter called the "Union," is evidence that Company and the Union have agreed, and do hereby agree as follows:

* * *

ARTICLE VII
Grievance Procedure

Section 1.

A grievance is hereby defined as a claim or dispute regarding the interpretation or application of the terms of this Agreement. . . .

* * *

ARBITRATION

* * *

Section 10.

The Arbitrator selected must be an attorney experienced in the interpretation of contracts and the rules of evidence. He shall be limited in his decision to the expressed terms of this Agreement and the grievance presented, and he shall have no authority to add to, subtract from, alter or modify in any manner the specific written terms of this Collective Bargaining Agreement. . . .

* * *

ARTICLE XXIV

Agreement

This Agreement constitutes the entire agreement between the parties and supercedes all other agreements written or oral, if any, heretofore made, and both parties acknowledge that all matters which could have been the subject of collective bargaining between the parties have been

explored and that no such matter shall be revived, or presented, during the term of this Agreement.

ARTICLE XXV

Term of Agreement

This Agreement shall remain in full force and effect from February 1, 1979, through January 31, 1981. . . .